

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KENNETH MICHAEL ADKINS,

Defendant-Appellant.

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UNPUBLISHED

January 15, 2008

No. 273167

Huron Circuit Court

LC No. 05-004443-FH

Before: Talbot, P.J., and Zahra and Meter, JJ.

PER CURIAM.

Defendant was convicted by a jury of fourth-degree criminal sexual conduct, MCL 750.520e(1)(b) (sexual contact accomplished by force or coercion),<sup>1</sup> and was sentenced to 30 months' probation, with 90 days to be served in jail. Defendant subsequently moved for a new trial based on ineffective assistance of counsel. After conducting an evidentiary hearing, the trial court denied the motion and defendant appeals as of right. We affirm.

Defendant is a former administrator at the Huron County Medical Care Facility. The complainant, an employee at the facility, testified that she went to defendant's office to discuss a problem she was experiencing with her coworkers. According to the complainant, defendant moved his chair next to her, reached his hand into her jeans, and touched her underneath her underwear, in her pubic area. The complainant stated that she immediately pulled defendant's hand out and verbally indicated he should not engage in this behavior. The defense theory at trial was that the complainant fabricated the allegations of sexual contact and that the incident did not occur.

On appeal, defendant argues that he is entitled to a new trial because defense counsel was ineffective in several respects. An ineffective assistance of counsel claim is a mixed question of fact and constitutional law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). The trial court's findings of fact are reviewed for clear error. *Id.*; MCR 2.613(C). Whether the facts constitute a violation of the defendant's right to the effective assistance of counsel is a question of constitutional law and is reviewed de novo. *LeBlanc*, *supra* at 579.

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<sup>1</sup> We note that the Amended Judgment of Sentence incorrectly identifies the statutory provision for defendant's conviction as MCL 750.520e(1)(a).

To establish ineffective assistance of counsel, a defendant must show that his “counsel’s performance fell below an objective standard of reasonableness, and that the representation so prejudiced the defendant as to deprive him of a fair trial.” *People v Pickens*, 446 Mich 298, 338; 521 NW2d 797 (1994). The defendant must overcome the presumption that the challenged action might be considered sound trial strategy. *People v Tommolino*, 187 Mich App 14, 17; 466 NW2d 315 (1991). To establish prejudice, the defendant must show that there is a reasonable probability that, but for counsel’s error, the result of the proceeding would have been different. *People v Johnson*, 451 Mich 115, 124; 545 NW2d 637 (1996). The burden is on defendant to produce factual support for his claim of ineffective assistance of counsel. *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999).

Defendant first argues that counsel was ineffective for hastily arranging and permitting police to interview defendant before any charges were filed. During the interview, defendant denied that any sexual contact occurred. Although this was consistent with the defense theory at trial, defendant now contends that he did engage in consensual sexual contact with the complainant and argues that his ability to present this defense was compromised by his earlier statements during the police interview. Defendant asserts that counsel should have expended additional time and effort to develop a rapport with defendant and investigate the allegations before arranging for the interview.

Although a defense attorney is “afforded broad discretion in the handling of cases,” *Pickens*, *supra* at 325, the failure of counsel to conduct a reasonable investigation can constitute ineffective assistance of counsel. *People v McGhee*, 268 Mich App 600, 626; 709 NW2d 595 (2005). It is counsel’s duty to “make an independent examination of the facts, circumstances, pleadings and law involved” and to pursue all leads relevant to the issues. *People v Grant*, 470 Mich 477, 486-487; 684 NW2d 686 (2004). A sound trial strategy is one based on investigation and supported by reasonable professional judgments.

At the time the police interview was scheduled, no charges had been filed. Before scheduling the interview, defense counsel met with defendant and discussed the allegations. Counsel asserts that defendant informed him there were rumors that he had engaged in inappropriate sexual contact with someone at work, but adamantly denied the allegations. Instead, defendant explained that he was preparing to enter into union negotiations and believed that he was being accused as part of a labor dispute. Counsel testified that defendant was anxious to have the matter resolved because it was affecting his employment. Although defendant claimed at the subsequent evidentiary hearing that he engaged in consensual sexual contact with the complainant, he acknowledged that he never admitted this to his attorney before the police interview was scheduled. Considering the circumstances and information available to defense counsel at the time, we agree with the trial court that counsel’s decision to arrange for a police interview was a matter of strategy, which this Court will not second-guess with the benefit of hindsight. *People v Rice (On Remand)*, 235 Mich App 429, 445; 597 NW2d 843 (1999).

Defendant next argues that counsel was ineffective for pursuing the defense theory that no sexual contact occurred and that the complainant fabricated the allegations. Although defendant admitted that he did not initially inform counsel that he engaged in consensual sexual contact with the complainant, he claimed that he later wrote counsel a letter in which he revealed what actually happened. At the evidentiary hearing, defendant testified that he engaged in

consensual sexual contact with the complainant and asserted that this theory should have been pursued at trial.

“A defendant is entitled to have his counsel prepare, investigate, and present all substantial defenses.” *People v Kelly*, 186 Mich App 524, 526; 465 NW2d 569 (1990). Where there is a claim that counsel was ineffective for failing to raise a defense, the “defendant must show that he made a good-faith effort to avail himself of this right and that the defense of which he was deprived was substantial.” *Id.* “A substantial defense is one that might have made a difference in the outcome of the trial.” *Id.*

Defendant relies on a letter to support his claim that he informed counsel that he had engaged in consensual sexual contact. Counsel denied receiving the letter and the trial court resolved this credibility issue in favor of the attorney. Giving deference to the trial court’s determinations of credibility, we find no error in the trial court’s determination that defense counsel never received the letter. *People v Wolfe*, 440 Mich 508, 514-515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). Further, although the letter contains defendant’s admission that he participated in flirtatious conduct and contemplated having an affair with the complainant, it does not contain an admission by defendant that he engaged in consensual sexual contact with the complainant. Based on this record, defendant has failed to demonstrate that he made a good-faith effort to avail himself of a defense premised on consensual conduct.

Next, defendant claims that counsel was ineffective for recommending that defendant not submit to a polygraph examination. Defense counsel advised defendant regarding the risks and benefits of a polygraph examination and conveyed his belief that the risks outweighed any potential benefit, but left the decision whether to pursue a polygraph examination to defendant. This was a tactical decision and defendant has failed to show that counsel’s recommendation not to pursue a polygraph examination was unsound, particularly given defendant’s later revelation that he did engage in sexual contact with the claimant.

The record also fails to support defendant’s claim that counsel prevented him from testifying at trial. Counsel recognized it was defendant’s right to decide whether to testify, discussed the matter with defendant, and recommended that defendant not testify as a matter of strategy. The record does not show that counsel’s recommendation to not have defendant testify was objectively unreasonable, especially considering the trial court’s observation at the conclusion of the evidentiary hearing that defendant made a poor witness and was not credible. *People v Shively*, 230 Mich App 626, 629; 584 NW2d 740 (1998).

Defendant next argues that his counsel should have withdrawn due to a conflict of interest because he was a witness to defendant’s police interview. To establish ineffective assistance of counsel, defendant must show that an actual conflict of interest adversely affected his lawyer’s performance. *People v Smith*, 456 Mich 543, 556; 581 NW2d 654 (1998). Defense counsel considered the possibility that withdrawal might be required if it was necessary to call him as a witness, but determined after hearing the police officer’s testimony at a *Walker*<sup>2</sup> hearing

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<sup>2</sup> *People v Walker (On Rehearing)*, 374 Mich 331; 132 NW2d 87 (1965).

that there was no need for him to testify to dispute the officer's testimony. Defendant has failed to show either that counsel's testimony was required or that there was an actual conflict of interest requiring counsel's removal.

Defendant also argues that defense counsel was ineffective for failing to call certain witnesses at trial. "Decisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy, and this Court will not substitute its judgment for that of counsel[.]" *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002). "Furthermore, the failure to call witnesses only constitutes ineffective assistance of counsel if it deprives the defendant of a substantial defense." *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004).

At the evidentiary hearing, the trial court found that the proposed testimony of two of the witnesses identified by defendant would not have been admissible because it constituted hearsay, and that the testimony of another potential witness would have been merely cumulative. Defendant does not challenge these findings nor does he identify which witnesses should have been called at trial. Although defendant refers to an unidentified character witness, the failure to identify either the witness or the proposed testimony precludes a finding of ineffective assistance of counsel.

Defendant contends that counsel was ineffective for opening the door to testimony by prosecution witnesses about the complainant's prior consistent statements concerning the charged offense. Because of the defense theory that the complainant fabricated the allegations, the prosecutor was permitted to offer evidence of the complainant's prior consistent statements under MRE 801(d)(1)(B). However, as noted previously, defendant has failed to demonstrate that counsel was ineffective for pursuing this theory at trial because it was consistent with the information defendant gave his counsel and with his police interview. We further observe that even if defendant had raised a defense of consent, the complainant's prior consistent statements describing the sexual contact as nonconsensual would still have been admissible under MRE 801(d)(1)(B). Therefore, no basis exists for this Court to conclude that counsel was ineffective.

We also find no merit to defendant's claim that counsel was ineffective for failing to object to testimony that defendant had a reputation for firing employees. This testimony permitted defense counsel to argue that the complainant was motivated to fabricate the allegations of sexual contact in retaliation for defendant's firing of her coworkers, including her supervisor, and falls within the purview of trial strategy.

Finally, defendant argues that counsel was ineffective for failing to object to a statement by one of the complainant's coworkers that defendant had stalked her friend. The comment was made in reference to defendant's frequent conduct of appearing in the complainant's work area, inquiring about her relationship with a male coworker, and asking the complainant if she was going to tell anyone about what had transpired. Although defendant argues that the testimony was not admissible under MRE 404(b)(1), we find that it was admissible as part of the *res gestae* of the charged crime. *People v Sholl*, 453 Mich 730, 740-742; 556 NW2d 851 (1996). Because

an objection based on MRE 404(b) would have been futile, counsel was not ineffective for failing to object. *People v Ackerman*, 257 Mich App 434, 455; 669 NW2d 818 (2003).

Affirmed.

/s/ Michael J. Talbot

/s/ Brian K. Zahra

/s/ Patrick M. Meter